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Citation for published version:

McCall-Smith, K 2014, 'Mind the Gaps: The ILC Guide to Practice and Reservations to Human Rights Treaties', *International Community Law Review*, vol. 16, no. 3, pp. 263-305.
<https://doi.org/10.1163/18719732-12341282>

Digital Object Identifier (DOI):

[10.1163/18719732-12341282](https://doi.org/10.1163/18719732-12341282)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

International Community Law Review

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1. Mind the Gaps: The ILC Guide to Practice and Reservations to Human Rights Treaties

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1.1 Introduction

At the best of times the rules on reservations to treaties baffle many international law practitioners and the states that must navigate them. The persisting confusion from the application of the default reservations regime codified by the 1969 Vienna Convention on the Law of Treaties¹ (Vienna Convention) is exacerbated when these rules are used to interpret reservations to human rights treaties. Great hope for clarity in the reservations rules was focused on the outcome of the eighteen year study on reservations to treaties conducted by the International Law Commission (ILC). However, following the 2011 publication of the ILC Guide to Practice on Reservations to Treaties² (Guide to Practice or Guide) it is apparent that despite several progressive guidelines, little has changed in the context of reservations to human rights treaties.

The long-standing universality versus integrity debate is facilitated by the Vienna Convention reservations rules, rules which are frequently described along the lines of ‘complex, ambiguous, and often counterintuitive’.³ Applying these general reservations rules to human rights treaties, which are challenged for many of the same reasons, creates a system of ambiguity and confusion about the obligations owed by states. This perpetuates the failure of many States Parties to actually implement human rights obligations. As the cornerstone of international law, treaties demand clear legal rules yet, in practice, it is obvious that states

¹ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (Vienna Convention).

² International Law Commission (ILC), Report of the International Law Commission on its 63rd Session, Guide to Practice on Reservations with Commentary, UN Doc. A/66/10/Add.1 (2011) (Guide to Practice).

³ Laurence Helfer, “Not Fully Committed? Reservations, Risk, and Treaty Design”, 31 *Yale Journal of International Law* (2006) pp. 367, 367.

relish the imprecise nature of the reservations rules, particularly in relation to human rights treaties.

The following examines the practice of making reservations to human rights treaties in light of the historical attitude of states to these treaties as well evolving state practice and forward-thinking efforts on the part of the ILC and others. It is based on case study of reservations to the core UN human rights treaties and a doctrinal study of the general law of reservations in relation to treaties. While the enduring problems of applying the Vienna Convention regime to reservations to human rights treaties will be outlined, this article forgoes a repeat of the historical development of the reservations rules that have been set forth on many occasions.⁴ Instead, it will focus on the reservations practice particular to human rights and examine the different types of reservations that plague human rights treaties. Specifically it will address the problems perpetuated by the object and purpose test, the lack of clarity of the legal effect and consequence of invalid reservations as well as the question of who decides invalidity and how this decision is impacted by the non-reciprocal nature of human rights treaties. Finally, the pertinent features of the Guide to Practice will be introduced and examined in light of the practical application of the guidelines in response to the problems most prevalent when analysing reservations to human rights treaties.

1.2 Vienna Convention Lacunae

The flexibility of the reservations regime embodied in Vienna Convention Articles 19–23 is the focus of an extraordinary amount of literature largely because the rules often provide no definitive answer on the validity of a reservation. Initially, the imprecision of the Article 19(c) object and purpose test sets the stage for a catalogue of questions about the application

⁴ e.g. Edward T. Swaine, “Reserving”, 31 *Yale Journal of International Law* (2006) pp. 307; Catherine Redgwell, “The Law of Reservations in Respect of Multilateral Conventions”, in J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions* (1997); Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (1995).

of these rules. The legal effect and consequence of a decision on invalidity as well as what organ may determine the validity of a reservation present further obstacles to their application. The following sections introduce the Vienna Convention reservations rules and address each legal gap in turn; one further consideration is also included—the non-reciprocal nature of human rights treaties.

1.2.1 Vienna Convention Rules on Reservations

The Vienna Convention reservations rules are the default rules for all treaties. The rules are viewed as customary international law.⁵ Articles 19 through 21 are the focus of this article. Article 19 introduces the conditions under which a state may formulate a reservation and in paragraph (c) establishes the object and purpose test for determining the permissibility⁶ of a reservation. The article is a restraint upon state action because it outlines that an incompatible reservation may not be made.⁷

Acceptance of and objection to reservations are governed by Article 20 which provides that an objection does not preclude entry into force of the treaty between the objecting and reserving states unless expressly indicated by the objecting state (Article 20(4)(b)). Article 20(5) further notes that unless the treaty provides an alternative, all reservations will be deemed accepted if there are no objections at the end of twelve months thus incorporating the tacit acceptance rule. Article 21 governs the legal effect of reservations and provides that a reservation will modify the relations between the reserving state and the State

⁵ See generally, Thomas Giegerich, “Reservations to Multilateral Treaties”, *MPEPIL*, available via: <http://www.mpepil.com> (accessed on 9 September 2013).

⁶ In keeping with the vocabulary preferred by the ILC, references to permissibility encompass evaluations of a reservation under Article 19 of the Vienna Convention, and include those specifically examined for compatibility using the object and purpose test set forth in Article 19(c). See *Guide to Practice on Reservations to Treaties, with commentaries as provisionally adopted by the ILC* at its 62nd session (see UN doc A/65/10 (2010) (Draft Guide to Practice), 3.1.3 and accompanying commentary.

⁷ Redgwell, “The Law of Reservations in Respect of Multilateral Conventions”, 8; see also Oona Hathaway, “Do Human Rights Treaties Make a Difference?”, (2002) 111 *Yale Law Journal* 1935, 1952 et seq.

Parties accepting the reservation to the extent of the reservation. It further outlines that the provision affected by the reservation will not apply between the reserving state and any objecting state not opposing entry into force of the treaty between the two. The Vienna Convention is indifferent to subdivisions of international law and therefore these rules apply to treaties relating to the law of the sea and nuclear disarmament as well as human rights treaties unless the treaty specifically outlines its own reservations regime. As will be presented, the application of the Vienna Convention rules to human rights treaties presents several unresolved dilemmas.

Reviewing reservations made to human rights treaties it is clear that many have not been assessed by states as contemplated by the Vienna Convention rules, particularly those lodged in the earliest days of the human rights treaty movement,. Reservations of questionable or obvious invalidity remain attached to human rights treaties primarily because the obligations *inter se* are not affected by an objection pursuant to Article 21. Unlike treaties containing reciprocal obligations, the decision of a state to forgo a human rights obligation only impacts the third-party beneficiaries of the obligations, individuals, not other State Parties. Thus there is normative ambiguity because arguably invalid reservations are maintained by states in the absence of objections and, according to the tacit acceptance rule of Article 20(5), those reservations to which no objection is made are deemed accepted.

It is not only reservations that are incompatible with Article 19(c) that lead to normative ambiguity in the context of human rights treaties. Sweeping reservations and reservations subordinating treaty obligations to domestic law also cause incoherence in the treaty system. These types of reservations are generally challenged on the basis of incompatibility with

Article 19 due to the imprecise reference to domestic law. As it stands, the Vienna Convention effectively facilitates the presence of reservations of questionable validity due to the absence of guidance as to what should happen when inter-state treaty relations are not altered by an objection or acceptance—the non-reciprocal treaty dilemma.

When specifically addressing human rights treaties commentators on the appropriateness of the regime tend to fall into two camps. The first group typically relies on general principles of international law to support the adequacy of the Vienna Convention to address reservations to human rights treaties.⁸ According to a few such authors the flexibility of the system is a boon to human rights treaties.⁹ The key considerations are the appropriateness of a single residual system to govern reservations and the assumption that the Vienna Convention includes a self-policing element—the acceptance/objection system found in Article 20—which in practice has served to counter invalid reservations borne out by the object and purpose test.

The second group of commentators points to the unique characteristics of human rights treaties, including non-reciprocity,¹⁰ that prevent any meaningful application of the Vienna Convention regime¹¹ and the subsequent detrimental effect¹² of reservations on the realisation of human rights. Redgwell notes that the flexibility of the Vienna Convention is ‘somehow

⁸ e.g., Markus Schmidt, “Reservations to United Nations Human Rights Treaties—The Case of the Two Covenants”, in J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions* (1997) pp. 20-34., 33; Pierre-Henri Imbert, “Reservations and Human Rights Conventions”, 6 *Human Rights Review* (1981) pp. 28, 46; Anja Seibert-Fohr, “The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties”, in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime* (2004) pp. 183-211, 207.

⁹ e.g., Madeline Morris, “Few Reservations”, 1 *Chicago Journal of International Law* (2000), pp. 341, 343.

¹⁰ Swaine, “Reserving”, 342; Redgwell, “The Law or Reservations in Respect of Multilateral Conventions”, 18; Lijnzaad, *Reservations to UN-Human Rights Treaties*; Imbert, “Reservations and Human Rights Conventions”, 33.

¹¹ Catherine Redgwell, “Reservations to Treaties and Human Rights Committee General Comment No. 24(52)” 46 *ICLQ* (1997) pp. 390; Catherine Redgwell, “Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties”, 64 *British Yearbook of International Law (BYBIL)* (1993) pp. 245, 252.

¹² See generally, Lijnzaad, *Reservations to UN-Human Rights Treaties*; Rosalyn Higgins, “Human Rights: Some Questions of Integrity”, 15 *Commonwealth Law Bulletin* (1989) pp. 598.

contrary to the inalienable political rights and freedoms of human beings' therefore circumstances, such as economic depression, are less palatable excuses for making reservations than they might be in the context of an environmental treaty.¹³ Certain commentators have attached an air of moral reprimand to their discussions of reservations formulated by states,¹⁴ while others contend that they could be a healthy sign that a state has seriously considered the treaty and its implications.¹⁵ Particularly damning is Hathaway's contention that reservations perpetuate the idea that securing human rights through treaties is simply 'cheap talk'.¹⁶ Altogether, the many conflicting opinions underscore that the application of the Vienna Convention regime is less than settled, particularly in relation to human rights treaties.

1.2.2 The Object and Purpose Test

The primary problem with the Vienna Convention is that regardless of treaty type the text imposes the very vague and subjective object and purpose test to determine the object and purpose of a treaty and therefore assess the validity¹⁷ of a reservation that is not covered by Article 19(a) or (b). Initially, there is an obvious difficulty in applying a subjective test to determine whether reservations defeat the object and purpose of a treaty especially considering that '[i]t is not normal practice in treaty drafting to spell out the "object and

¹³ Redgwell, "The Law on Reservations in Respect of Multilateral Conventions", 18.

¹⁴ e.g., Pierre-Henri Imbert, "Reservations to the European Convention on Human Rights Before the Strasbourg Commission: the *Temeltasch* Case" 33 *ICLQ* (1984) pp. 558, 568, noting the "devious approach" used by Switzerland when formulating an interpretative declaration that was subsequently determined to be a reservation by the European Commission on Human rights in the *Temeltasch* case.

¹⁵ Susan Marks, "Three Regional Human Rights Treaties", in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (1997) pp.35-63, 61. In this instance Marks notes that the small number of reservations to the African Charter on Human and Peoples' Rights suggests that the Charter is not taken seriously. However, the years since Marks's article has seen progress within the African system.

¹⁶ Hathaway, "Do Human Rights Treaties Make a Difference?", 1946.

¹⁷ Validity is the term adopted by the ILC to "describe the intellectual operation consisting in determining whether a unilateral statement made by a State ... and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State ... was capable of producing the effects attached in principle to the formulation of a reservation." Therefore, a reservation must be permissible to be valid. See ILC Yearbook 2006, UN Doc. A/61/10 (2006), 324, para. (2) of the general introduction to Part 3 of the draft guidelines.

purpose” as if one were defining technical terms.’¹⁸ Lijnzaad characterises the object and purpose test as ‘both transparent and opaque at the same time’ because though the wording seems to provide a clear indicator of what reservations will be acceptable under a treaty, it is actually unclear in practice.¹⁹ This flexibility stems from the reality that states applying identical treaty rules often come to disparate outcomes for a variety of reasons unrelated to treaty law.

The general meaning of object and purpose under the Vienna Convention rules has been chronically rehashed without a definitive answer from its inception beginning with Brierly²⁰ and Fitzmaurice²¹ then, more recently, by Buffard and Zemanek,²² with a host of opinions in between.²³ Recalling that the object and purpose test stems from the *Genocide Advisory Opinion*²⁴ and the International Convention on the Prevention and Punishment of the Crime of Genocide²⁵ (Genocide Convention), a convention with an easily determined object and purpose, it is difficult to accept that the object and purpose test remains without further guidance. Though outlined in Article 19(c), at no point in the Vienna Convention is the test

¹⁸ Schabas, “Time for Innovation and Reform”, 47.

¹⁹ Lijnzaad, *Reservations to UN-Human Rights Treaties*, 4.

²⁰ James L. Brierly, Report on Reservations to Multilateral Conventions, UN Doc. A/CN.4/41 in ILC Yearbook, 1951, Vol. II, UN Doc. A/CN.4/SER.A/1951/Add.1 (1951).

²¹ Gerald G. Fitzmaurice, “Reservations to Multilateral Conventions”, 2 *International and Comparative Law Quarterly (ICLQ)* (1953) pp. 1.

²² Iain Buffard and Karl Zemanek, “The “Object and Purpose” of a Treaty: an Enigma?” 3 *Austrian Review of International and European Law* (1998) p. 311.

²³ e.g., Curtis Bradley and Jack Goldsmith, “Treaties, Human Rights, and Conditional Consent”, 149 *University of Pennsylvania Law Review* (2000) pp. 399, 429-39; Jan Klabbbers, “Some Problems Regarding the Object and Purpose of Treaties”, 8 *Finnish Yearbook of International Law* (1997) pp. 138; William Schabas, “Reservations to Human Rights Treaties: Time for Innovation and Reform”, 32 *Canadian Yearbook of International Law* (1994) pp. 39, 47; Daniel Hylton, “Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations”, 27 *Vanderbilt Journal of Transnational Law* (1994) pp. 419, 429-32; Jean Kyongun Koh, “Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision”, 23 *Harvard International Law Journal* (1982-83) pp. 71; José M. Ruda, “Reservations to Treaties”, 146 *Recueil des cours* (1975) pp. 95.

²⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports* 1951, p. 15.

²⁵ Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 78 UNTS 277, 9 December 1948.

defined,²⁶ nor is this concept limited to reservations—it appears in six²⁷ other provisions of the Convention. The negotiating states appear to have embraced the complete vagueness of the concept and applied it in every instance where agreement on a more refined standard could not be reached. Whilst there has never been a settled approach to applying the object and purpose test in the context of reservations, generally commentators interpret the test as focusing on the essence or overall goal of the treaty rather than parsing the individual articles, thus, the test has proved difficult to apply.²⁸

The object and purpose test represents a constraint on a state's ability to attach reservations to its instrument of ratification; however, 'the claim that a particular reservation is contrary to the object and purpose is easier made than substantiated.'²⁹ This is directly related to the lack of guidance on how to apply the test particularly when the treaty being examined contains multifarious rights and obligations, such as one of the core³⁰ human rights treaties.

1.2.3 Legal Effect of an Invalid Reservation

²⁶ Alain Pellet, *Tenth report on Reservations*, UN Doc. A/CN.4/558, Add.1 and Add.2 (2005) para. 77; Hylton, "Default Breakdown", 450.

²⁷ Reference to the object and purpose of a treaty is also made in Arts. 18, 31, 33, 41 and 58. It also appears in Art. 20(2), which is part of the reservations regime, however this article deals with the distinct situation where the application of the treaty in its entirety between all the parties is an essential condition of the consent and is not the backbone of the reservation rules against which compatibility is assessed.

²⁸ Helfer, "Not Fully Committed", 367; Jan Klabbers, "Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties", 69 *Nordic Journal of International Law* (2000) pp. 179, 181.

²⁹ Lijnzaad, *Reservations to UN-Human Rights Treaties*, 82-83.

³⁰ The nine treaties designated as "core" that form the case study are as follows (in order of adoption): the Convention on the Elimination of all forms of Racial Discrimination (CERD), 660 UNTS 195, 7 March 1966; the International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 December 1966; the International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, 16 December 1966; the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), 1249 UNTS 13, 18 December 1979; the Convention on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1465 UNTS 85, 10 December 1984; the Convention on the Rights of the Child (CRC), 1577 UNTS 3, 20 November 1989; the International Convention for the Protection of the Rights of Migrant Workers and Their Families (ICRMW), 2220 UNTS 3, 18 December 1990; the Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3, 13 December 2006; the International Convention on the Protection of All Persons from Enforced Disappearance (ICED), UN Doc. A/61/488.C.N.737.2008.TREATIES-12, 20 December 2006.

Another crucial sticking point is what to do once a position has been taken on the validity, more specifically the invalidity, of a reservation. ‘Invalid’ reservations include those that are impermissible for failure to clear Article 19 hurdles as well as reservations that are deficient for procedural or structural reasons and reservations that violate other aspects of the Vienna Convention or the treaty against which the reservation is made. Whether the reserving state’s consent to be bound is affected and whether the reserving state continues to be a contracting party is often questioned in relation to a determination that a reservation is invalid.³¹ Bowett, who is credited with the most extensive examination of these questions outside of the ILC, framed the issue as tension between two different expressions of the will of the state: on one hand a state expresses the will to be bound to a treaty and on the other hand there is the will to impose a condition, the invalid reservation.³² He equates the invalidity of the reservation to a mistake of law, rather than a mistake of fact, which will not automatically invalidate the consent to be bound or the treaty according to the Vienna Convention^{33, 34} Bowett’s work is primarily concerned with the resulting relationship between the State Parties. While the legal position of the state is an undeniably interesting legal query there is relatively little attention paid to what happens as a consequence of a reservation being declared invalid which is more important for third party rights-holders under human rights treaties.

It is the lack of guidance on legal effect that facilitates a state’s ability to maintain an invalid reservation. The Vienna Convention is silent on legal effect when a reservation to a human rights treaty is determined to be invalid by an entity other than a state, such as a treaty body.

³¹ See generally Ryan Goodman, “Human Rights Treaties, Invalid Reservations, and State Consent”, 96 *AJIL* (2002) pp. 531; Derek W. Bowett, “Reservations to Non-Restricted Multilateral Treaties”, 48 *BYBIL* (1976-77) 67.

³² Bowett, “Reservations to Non-Restricted Multilateral Treaties”, 76.

³³ Article 48(1) provides: “A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.”

³⁴ Bowett, “Reservations to Non-Restricted Multilateral Treaties”, 76.

When addressed in an international tribunal the legal effect of the determination will be detailed in the decision. Only in the context of the regional human rights systems has the question of precisely what legal effect an impermissibility determination has on a reservation been examined by an international tribunal.³⁵ The practice of the judiciary in this regard does not deliver failsafe answers to the question of legal effect outwith the dispute under consideration.

1.2.4 Consequence of Invalidity

Recognition of the lack of a consequence for an invalid reservation in the Vienna Convention is one unifying theme in the reservations debate. A determination of impermissibility under Vienna Convention Article 19(c) is ‘deprived of concrete effect’.³⁶ States also recognise the failure of the Vienna Convention to address the consequence of invalid reservations as the major gap of the reservations regime.³⁷ The lack of consequence is derived from the fact that nothing in the Vienna Convention compels a state to take view on a reservation and states, save a small number, rarely take issue with reservations to human rights treaties. Even when a state does determine a reservation to be invalid there is nothing in the Vienna Convention outlining a legal effect capable of creating a concrete consequence. As a result, a state formulating an invalid reservation simply maintains the invalid reservation and perpetuates

³⁵ See, e.g., *Belilos v. Switzerland*, (App. No. 20/1986/118/167), ECtHR, Series A, Vol. 132, 10 EHRR 466, 29 Apr. 1988; *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, Advisory Opinion OC 2/82 (24 Sept. 1982), IACtHR (Series A) No. 2 (1982); see discussions in Marks, “Three Regional Human Rights Treaties”, 35; Susan Marks, “Reservations Unhinged: The *Belilos* Case Before the European Court of Human Rights”, 39 *ICLQ* (1990) pp. 300; Iain Cameron and Frank Horn, “Reservations to the European Convention on Human Rights: The *Belilos* Case”, 33 *German Yearbook of International Law* (1990) pp. 69; Ronald St.J. Macdonald, “Reservations under the European Convention on Human Rights”, 1988 *Revue belge de droit international* (1988) pp. 429; Henry J. Bourguignon, “The *Belilos* Case: New Light on Reservations to Multilateral Treaties” 29 *Virginia Journal of International Law* (1988) pp. 347.

³⁶ Guide to Practice, 2.6.2, commentary para. 26 and 3.3.1, commentary para. 7; Alain Pellet, “The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur”, 24 *European Journal of International Law (EJIL)* (2013) pp. 1061, 1090; Françoise Hampson, *Working paper submitted pursuant to Sub-Commission decision 1998/113*, UN Doc. E/CN.4/Sub.2/1999/28 (1999) (1999 *Working paper*), paras. 24, 31.

³⁷ Observations by El Salvador, Finland, Norway and Portugal in ILC, UN Doc. A/CN.4/639 (2011), paras. 119, 121, 129 and 130. See also Swaine, “Reserving”, 322.

the variable myriad of interpretations of its treaty obligations until another State Party calls for resolution of the issue.

Current reservation practice tends to favour either nullity or severance as the consequence of invalidity though the effectiveness of both doctrines is limited when applied to human rights treaties. Determining a concrete consequence is a vital function of rules governing treaty interpretation so that obligations owed *inter se* can be determined. The third-party beneficiaries of the core human rights treaties, individuals, are less protected by assertions of nullity or severability when the reserving state disagrees and refuses to withdraw the reservation. From the domestic level the full expression of an obligation owed by the reserving state remains obscured by the reservation and recourse is limited without the intervention of another state or dispute resolution mechanism. The ILC suggests that the normative gap may ‘have been deliberately created by the authors of the [Vienna] Convention.’³⁸ Whether deliberate or not, the current state of reservations, especially in the context of human rights treaties, suffers from the lack of more pronounced rules on the consequence of an invalidity determination.

1.2.5 Non-reciprocal Nature of Human Rights Treaties

Non-reciprocity is one of the most salient features of human rights treaties when examining the issue of reservations from a pure treaty law perspective. The traditional concept of reciprocity is largely a ‘stabilizing factor’ in international treaty law as it allows for a balancing of interests between the parties.³⁹ Whilst the Special Rapporteur on Reservations to Treaties considers the concern over the non-reciprocal nature of human rights treaties ‘non-

³⁸ Guide to Practice, 3.3.1, commentary para. 2.

³⁹ Lijnzaad, *Reservations to UN-Human Rights Treaties*, 67.

sensical',⁴⁰ it has been acknowledged by courts and commentators as a significant consideration in the context of reservations to human rights treaties.⁴¹ Reciprocity is essential when there is no compulsory judicial system or central authority with the power to enforce the law such as the situation of international law.⁴² There is no 'probability of harm'⁴³ to the interest of a state stemming from the reservation of another state to a human rights treaty. Thus, the argument that the Vienna Convention regime is self-policing is unconvincing. The non-reciprocal nature of human rights treaties will be examined throughout the remainder of this article in relation to the specific legal gaps in the Vienna Convention regime.

1.2.6 Who Determines Invalidity?

There are also discordant views as to which entity—state, court or treaty body—has the ultimate competence to assess reservations using the Vienna Convention rules. Some authors choose to avoid this question, yet others have argued adamantly in favour of concurrent competency including the treaty bodies.⁴⁴ Linton argues that it is precisely this failure to designate a competent mechanism of review that has created a 'vacuum'⁴⁵ and perpetuates the problem of reservations to human rights treaties. Alston and others have spent many years analysing the development, strengths and weaknesses of the treaty bodies as part of the

⁴⁰ Pellet, "A General Presentation by the Special Rapporteur", 1079.

⁴¹ e.g. *Austria v. Italy*, (App. No. 788/60), ECommHR, 4 European YBHR 116 (1961), 11 Jan. 1961, p. 140; *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82 (24 Sept. 1982), IACtHR (Ser. A) No. 2 (1982), para. 29; *Hilaire v. Trinidad and Tobago*, Preliminary Objections, (1 Sept. 2001) IACtHR (Ser. C) No. 80 (2001), para. 95; Redgwell, "The Law on Reservations in Respect of Multilateral Conventions", 18; Lijnzaad, *Reservations to UN-Human Rights Treaties*, . 65-72; Imbert, "Reservations and Human Rights Conventions", 33.

⁴² Lijnzaad, *Reservations to UN-Human Rights Treaties*, 68.

⁴³ Lijnzaad, *Reservations to UN-Human Rights Treaties*, 70; See also, Simma, "From Bilateralism to Community Interest", 296-97.

⁴⁴ e.g. Kasey L. McCall-Smith, "Reservations and the Determinative Function of the Human Rights Treaty Bodies", 54 *German Yearbook of International Law* (2011) pp. 521; Suzannah Linton, "ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children", 30 *Human Rights Quarterly* (2008) pp. 436, 486 et seq; Dinah Shelton, "State Practice on Reservations to Human Rights Treaties", 1 *Canadian Human Rights Yearbook* (1983) pp. 205, 234.

⁴⁵ Linton, "ASEAN States", 486.

overall human rights regime.⁴⁶ These analyses tend to convey mixed messages on the competence of the treaty body, depending on which body is under review. The strong criticism of the treaty bodies by states is attributed to their positions as independent, non-political features of the UN system,⁴⁷ which seems contrary to the basic premise of international law as a body of law created and governed by states. Lijnzaad counters that it is the dynamic force of the international human rights system and functions of the treaty bodies that will ultimately lead to new rules related to treaty observance.⁴⁸ It is the supervisory side of reciprocity that ultimately concerns human rights treaties as the mutuality of obligation and exercise of mutual limitations pursuant to reservations are absent, which is where treaty bodies can fill a gap.

*1.3 Reservations to Human Rights*⁴⁹

For those who contend that human rights treaties should not cause any greater difficulty than other types of treaties in the wake of applying the Vienna Convention reservations rules it is worth noting why reservations to human rights obligations lend themselves to confusion. It is generally accepted that the law of treaties is premised on reciprocal contractual relationships between State Parties.⁵⁰ However, because human rights treaties embody obligations towards individuals, whose well-being is the responsibility of the state, rather than obligations between State Parties, there has been a general apathy by states in their duty to guard the

⁴⁶ Philip Alston, “The Historical Origins of the Concept of “General Comments” in Human Rights Law”, in H.J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2008) pp. 873-76; Philip Alston, “Beyond “Them” and “Us”: Putting Treaty Body Reform into Prospective”, in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000) pp. 501-25; Patrick J. Flood, *The Effectiveness of UN Human Rights Institutions* (1998). For a discussion particularly in the context of reservations, see Viljam Engström, *Understanding Powers of International Organizations* (2009), part IV.

⁴⁷ See, for example, discussion by Hilary Charlesworth, “The United Nation’s Human Rights System”, in C. Reus-Smit (ed.), *Keynote 05: The Challenge of UN Reform* (2005).

⁴⁸ Lijnzaad, *Reservations to UN-Human Rights Treaties*, 79.

⁴⁹ Unless otherwise noted, all reservations presented in the section can be found online in the United Nations Treaty Collection, available at <http://treaties.un.org> (UN Treaty Collection), Status of Treaties, treaty name, state.

⁵⁰ Swaine, “Reserving”, 342; Redgwell, “The Law or Reservations in Respect of Multilateral Conventions”, 18; Lijnzaad, *Reservations to UN-Human Rights Treaties*, 65-72; Imbert, “Reservations and Human Rights Conventions”, 33.

integrity of these instruments.⁵¹ Where states anticipate difficulty in guaranteeing every article of a human rights treaty the possibility of making reservations presents the opportunity for them to join the treaty without being held responsible for compliance with the agreement in its entirety.⁵² As noted by the Human Rights Committee (HRC), full compliance is more desirable ‘because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being’.⁵³ Acknowledging that reservations facilitate agreement on many levels, it has also been suggested that they splinter multilateral agreements into a network of bilateral and plurilateral agreements.⁵⁴ Though true when considering general multilateral treaties, the picture is not entirely accurate in the context of human rights treaties. The beneficiaries of human rights treaties are people, not states, thus there are no revised reciprocal agreements and states will not treat reserving states differently from non-reserving states.

Conceding that the practice of making reservations cannot be entirely eliminated it is important to understand how various types of reservations to human rights treaties work in practice within the current international regime. Practice has shown that acceptance of reservations to human rights treaties is entirely by tacit acceptance, not by a positive statement of acceptance.⁵⁵ Tension exists where a reservation has been both the subject of an objection and an acceptance by tacit acceptance. International law is ‘characteristically diffident as to the peculiarities of human rights conventions as a specific class of treaties’⁵⁶

⁵¹ Noted by Theo van Boven, member of CERD in the forward of Lijnzaad, *Reservations to UN-Human Rights Treaties*, v-vi.

⁵² Jeremy McBride, “Reservations and the Capacity to Implement Human Rights Treaties”. in J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions* (1997), pp. 120-184.

⁵³ Human Rights Council (HRC), *General Comment No. 24*, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 4.

⁵⁴ Hylton, “Default Breakdown”, 440.

⁵⁵ HRC, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 17. This point is also clear from even a cursory examination of reservations and objections to any of the core human rights treaties.

⁵⁶ Matthew Craven, “Legal Differentiation and the Concept of the Human Rights Treaty in International Law”, 11 *EJIL* (2000) pp. 489, 492.

despite the fact that international human rights law is generally accepted to be a distinct sub-discipline of international law. This must be understood from both the point of view of the reserving state and the other State Parties, including those who object to a reservation. The interrelationships between the obligations, reservations and states' treatment of both represents an amalgamation of rules of customary international law, treaty law, state practice, and, an aspect that must not be forgotten, international relations. Changing the domestic status quo is decidedly easier said than done. This is reflected by states in a multitude of situations including failure to ratify a treaty and anticipatory implementation problems as evidenced by reservations. A genuine conflict arises when states use reservations as a means of avoiding the obligations altogether.⁵⁷ Recognising that the status quo is not easily changed, the overarching purpose of a human rights treaty is to advance these rights on the domestic level and this objective is clear to all potential State Parties from the outset thus change should be anticipated.

Pursuant to the Vienna Convention, not all reservations are prohibited and states are free to make permissible reservations. Permissible reservations may, however, still be the subject of an objection though this may be a political objection rather than a substantive objection based on invalidity. It is objections to permissible reservations that are envisioned by Articles 20 and 21. States often make reservations in order to bide time until changes on the domestic level can be implemented or to maintain specific features of domestic law. Provided there is ample specificity, these reservations will not necessarily offend the object and purpose of a treaty. The Vienna Convention only proscribes reservations which are prohibited by the treaty itself, reservations made contrary to a treaty provision indicating only specified reservations may be made and reservations which contravene the object and purpose of the

⁵⁷ See, e.g., Yogesh K. Tyagi, "The Conflict of Law and Policy on Reservations to Human Rights Treaties", 71 *BYBIL* (2000) pp. 181, 209-12.

treaty.⁵⁸ The initial and second conditions placed upon a state's ability to make reservations are rather easily recognised and explicitly fail for want of compliance with the rules of treaty law as well as the treaty itself. It is the third condition provided by Article 19(c) of the Vienna Convention that breeds multifarious permutations of reservations that either blatantly contravene the object and purpose of a treaty—even in the eye of the most casual observer—or that, *prima facie*, appear not to violate specific reservations rules but in practice present dilemmas as to actual obligations owed and, consequently, enforcement issues.

In light of the different categories of rights, the application of specific types of reservations to the various rights reveals the interesting lacunae in reservations practice with respect to human rights. Initially there are those reservations which can easily be said to violate the object and purpose of a treaty and are the reservations to which objections are most often made. Two further detrimental categories of reservations to human rights treaties include those broad or vague references to application of a treaty only so far as it will be in concert with domestic law or local custom and those which subordinate specific obligation to existing domestic laws or customs. For clarity's sake, the former category will be classified as 'sweeping' reservations and the latter as 'subordination' reservations. The various assessment difficulties resulting from states' reservation practices, however, are not limited to these two reservation categories. The following presents a text-based assessment of reservations juxtaposed against various rights and highlights how applying the Vienna Convention reservations rules to human rights treaties undermines the integrity of treaty law and the human rights regime.

1.3.1 Permissible Reservations

⁵⁸ Vienna Convention, Art. 19.

Though universal acceptance and implementation of all obligations set forth in human rights treaties is the goal to which the human rights movement aspires, the reality is that perfect compliance cannot always be immediately effected. Permissible reservations are those which do not offend Article 19 or any other provision of the convention that might render the reservation invalid. This accommodates reservations made by states which have legitimate domestic reasons for reserving against an obligation, such as the will of the domestic population or compliance with specific laws enacted by a legitimate, functioning government.

The reservation made by Belize to the International Covenant on Civil and Political Rights (ICCPR) Article 12(2) is a good model of this practice: ‘The Government of Belize reserves the right not to apply paragraph 2 of Article 12 in view of the statutory provisions requiring persons intending to travel abroad to furnish tax clearance certificates.’ Belize thus provides the precise domestic legal reason why it cannot comply with the obligation in full. The restriction is minimal and corresponds to a legislative measure in operation in the state. Austria also provides a succinct and detailed reservation to ICCPR Article 10(3) whereby it reserves the right to detain juvenile prisoners together with adults under 25 years of age who give no reason for concern as to their possible detrimental influence on the juvenile. Both examples are detailed enough to provide complete information as to how the state will comply with the obligation. In these instances, the State Party’s compliance is altered but the object and purpose of the treaty remains intact.

1.3.2 Clearly Incompatible Reservations

Though typically rare in other types of multilateral treaties, there are instances in the area of human rights treaties where a state formulates a reservation that is clearly incompatible with the object and purpose of the treaty and is therefore impermissible. Such was the case with

one of the reservations made by Pakistan when it ratified the ICCPR on 23 June 2010. Among its reservations to nine articles of the ICCPR, Pakistan included the following reservation to Article 40: ‘The Government of the Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 40 of the Covenant.’ Article 40 establishes the periodic reporting supervision of the HRC and outlines the requirements of the State Parties to submit reports. The establishment of the periodic reporting system is a core feature of the UN human rights treaty system therefore there can be no doubt as to the incompatibility of this reservation with the object and purpose of the treaty.⁵⁹ As stated by Austria:

...the Committee provided for in Article 40 of the Covenant has a pivotal role in the implementation of the Covenant. The exclusion of the competence of the Committee is not provided for in the Covenant and in Austria’s views incompatible with the object and purpose of the Covenant.⁶⁰

Other objections⁶¹ echo the fundamental and essential role of the periodic reporting system in the implementation and overall operation of the ICCPR and question Pakistan’s commitment to the Covenant.

Pakistan also reserved against Articles 6, 7 and 18, which according to ICCPR Article 4(2) are non-derogable; the non-derogability of the articles raises the spectre of incompatibility. The largest number of objections made to any reservation to the ICCPR was recorded against

⁵⁹ A reservation to a provision concerning a monitoring body is not *per se* impermissible unless it negates the *raison d’être* of the treaty. See Guide to Practice, 3.1.5.7.

⁶⁰ UN Treaty Collection, ICCPR, Objection by Austria with regard to the reservations made by Pakistan (24 Jun. 2011).

⁶¹ UN Treaty Collection, ICCPR, Objections to Art. 40 by Pakistan by Australia, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Netherlands, Portugal, Slovakia, Spain, Sweden, Switzerland, UK and US.

Pakistan's catalogue of reservations based on incompatibility with the object and purpose of the treaty,⁶² as well as against Pakistan's similar reservations to CAT which met with almost identical tide of international rebuke.⁶³ Even without the objections by states it would be difficult to argue that a reservation to ICCPR Article 40 is consistent with the object and purpose of the treaty. While the objecting states, in some instances, detailed their views on the legal effect of the reservations on state relations *inter se*, the Vienna Convention lacks any guidance on the consequence for such determinations of incompatibility when the benefits and obligations do not flow between State Parties. Following a great deal of diplomatic haranguing, Pakistan withdrew the reservation to Article 40, as well as a number of other reservations receiving adverse attention by other State Parties.

1.3.3 Sweeping Reservations

A frequently used reservation formula is a brief statement limiting the application of the treaty as a whole insofar as the obligations are compatible with domestic law or customs, including religious law. These are often referred to as 'sweeping' reservations.⁶⁴ As noted by the ILC, states often put these forward to preserve the integrity of specific norms of their internal law despite the fact that reservations based on general reference to internal law, or sections of the law, make determining compatibility of the reservation with the treaty

⁶² UN Treaty Collection, ICCPR, objections to the reservations by Pakistan based on incompatibility with the object and purpose of the treaty: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, UK and US (including those objections filed outwith the twelve-month time-limit specified for notification of objections under Vienna Convention, Art. 20(5)).

⁶³ See UN Treaty Collection, Pakistan's reservations to CAT and objections made by a multitude of states.

⁶⁴ The term "sweeping" used to identify this particular type of reservations is attributed to Redgwell, see Catherine Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No. 24(52)", 46 *ICLQ* (1997) pp. 390, 391, but is echoed by other writers including Hampson, 1999 *Working paper*, para. 25(iii). Other authors have referred to this type of reservation as an "across-the-board" reservation, see, e.g., Karl Zemanek, "Alain Pellet's Definition of a Reservation", 3 *Austrian Review of International & European Law* (1998) pp. 295. The ILC also references the "across-the-board" reservation in its Guide to Practice, 1.1, commentary paras. 17-21.

impossible.⁶⁵ Sweeping reservations prohibit any successful analysis by another State Party as to whether the reservation complies with the object and purpose of the treaty. These reservations effectively result in the reserving state taking on no actual international obligations, which is one of the serious problems with the practice.⁶⁶

El Salvador's reservation to the International Convention on the Rights of Persons with Disabilities (CRPD) represents a prime example of a sweeping reservation that thwarts any determination as to the extent to which it complies with the object and purpose of the treaty:

The Government of the Republic of El Salvador signs the present ...to the extent that its provisions do not prejudice or violate the provisions of any of the precepts, principles and norms enshrined in the Constitution of the Republic of El Salvador, particularly in its enumeration of principles.⁶⁷

The indeterminate scope of such a reservation is unacceptable for many reasons but most importantly because it would be almost impossible for another State Party or a treaty body, not to mention a person subject to the jurisdiction of the author state, to ascertain precisely how the obligations will be recognised on the domestic level. A large percentage of reservations to human rights treaties rely precisely on broad reservations invoking general domestic laws as a commitment escape route. These sweeping reservations denote an

⁶⁵ ILC, UN Doc. A/62/10 (2007), 109; see also Karl Zemanek, "New Trends in the Enforcement of Erga Omnes Obligations", [2000] *Max Planck Yearbook of United Nations Law* (2000) pp. 1, 4; Redgwell, "Reservations and General Comment No. 24(52)", 397-98. The ILC addresses these types of reservations in Guide to Practice, 3.1.5.2 (Vague or general reservations).

⁶⁶ HRC, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 12; See also Marks, "Three Regional Human Rights Treaties", 61.

⁶⁷ El Salvador, Reservations to the CRPD, UN Doc. A/61/611 (2006). Austria, Czech Republic, the Netherlands, Portugal and Sweden objected to El Salvador's reservation.

apathetic approach to treaty observance and have been employed time and again by a multitude of State Parties to the core UN human rights treaties.

Almost as frequent as the sweeping reservation limiting compliance as far as allowed by domestic law are reservations limiting application of all treaty obligations to the extent they are permitted by local customs or religious practices. Reservations based on traditional custom or religion are detrimental because they leave compliance up to the reserving state's discretion.⁶⁸ One example is Malawi's original reservation to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) indicating that it would not consider itself bound to certain articles of the Convention due to the deep-rooted nature of certain practices of Malawians where obligations would require immediate eradication of those traditional customs and practices. This sweeping reservation exemplified the indefinite nature of Malawi's commitment to CEDAW. Fortunately, Malawi withdrew the reservation following Mexico's objection noting that the reservation impaired the treaty's purpose.

In predominantly Islamic states a sweeping reservation will often employ domestic law in conjunction with religion as an exception to obligation implementation. Reservations made by Oman and Malaysia to CEDAW clearly illustrate the problematic vagueness intrinsic to sweeping reservations combining the two contingencies. The first of five reservations made by Oman indicates that it will reserve the application of '[a]ll provisions of the Convention not in accordance with the provisions of the Islamic Sharia and legislation in force in the Sultanate of Oman'. Any CEDAW State Party wishing to evaluate the reservation for purposes of objection would need to be well-versed in the intricacies of both Sharia and the

⁶⁸ Lijnzaad, *Reservations to UN-Human Rights Treaties*, 86.

laws of Oman in order to make an informed decision as to whether Oman is upholding its treaty obligations. An equally ambiguous reservation is that made by Malaysia to CEDAW:

The Government of Malaysia declares that Malaysia's accession (to CEDAW) is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia law and the Federal Constitution of Malaysia.

Malaysia went on to further outline that in light of this general reservation it was specifically not bound to a multitude of articles.⁶⁹ In both instances, such sweeping references to general domestic law and Sharia law clearly cannot be viewed as an attempt to fulfil CEDAW gender equality commitments, especially when it has been acknowledged by Morocco, also a primarily Islamic country, that '[e]quality of this kind is considered incompatible with the Islamic Sharia.'

While it has been argued that this type of reservation is not a true reservation,⁷⁰ the reality is that it is precisely this formulation that is often used by states when ratifying human rights treaties. Sweeping reservations permeate the core treaties and there is a substantive quandary presented by sweeping reservations related to Islamic Sharia law as they specifically counter the main purpose of human rights treaties which is to identify universal international human rights standards.⁷¹ Sweeping reservations requiring compliance with domestic constitutions are no less problematic. Determining whether such reservations are compatible with the

⁶⁹ Particularly Malaysia did not consider itself bound by the provisions of CEDAW Arts. 2(f), 9(1), 9(2), 16(1)(a), (b), (d), (e), (f), (g) or (h).

⁷⁰ Zemanek, "Alain Pellet's Definition of a Reservation", 296. Zemanek argues that by including this type of unilateral statement under the umbrella of "reservations" a false legitimacy is conferred where theoretically these statements are *ipso facto* incompatible with a standard setting convention.

⁷¹ Anne F. Bayefsky, "Making Human Rights Treaties Work", in R.P. Claude and B.H. Weston (eds.), *Human Rights in the World Community: Issues and Action* (3rd ed., 2006) pp. 315-321, 319.

object and purpose of the treaty is all but impossible in these instances and is highly contingent on each treaty obligation in relation to every law, a potentially infinite number of tangents.

1.3.4 Subordination of International Obligations

In addition to sweeping reservations, another common reservation formula entails reservations subordinating specific treaty obligations to domestic law and represents another defeatist reservation practice that weakens human rights treaties. This practice is an on-going challenge due in large part to the uncertainty inherent in some domestic systems and their lackadaisical approach to recognition of international obligations and it contributes to the reservations chasm. Vienna Convention Article 27 specifically provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'; thus when reservation is so imprecise in its reference to internal law as to make the extent of the reservation unascertainable, objecting states will invoke Article 27 in addition to incompatibility under Article 19(c). Though reliance on Article 27 as a basis for objecting to a reservation is contested,⁷² it is worth noting that it is not an uncommon practice.⁷³

Subordination reservations effectively water down the reserving state's obligations and, depending on the actual realisation of the obligation on the domestic level, could equate to non-performance of treaty obligations. Reservations invoking internal law are not automatically impermissible and are, in some cases, necessary,⁷⁴ as detailed above *in Section 1.3.1*. However, these policy decisions evidence the fact that states are wary of commitments

⁷² Guide to Practice, 3.1.5.5, commentary, esp. para. 4.

⁷³ See e.g., UN Treaty Collection, ICCPR, objections to reservations made by Pakistan by Australia, Austria, Belgium, Canada, Czech Republic, Finland, France, and Greece; see also Françoise Hampson, Sub-Commission on the Promotion and Protection of Human Rights, *Specific Human Rights Issues, Reservations to Human Rights Treaties, Final working paper*, UN Doc. E/CN.4/Sub.2/2004/42 (2004) (2004 Final Working paper), para. 56.

⁷⁴ Guide to Practice, 3.1.5.5.

that would necessitate changes to their constitutions or existing laws when in reality if becoming a State Party in both name and practice was truly the ambition of a government it would push through the necessary changes prior to ratification.⁷⁵ Otherwise, the state's participation in the treaty is likely more a mere formality rather than an attempt to bring its legal system into conformity with the treaty.⁷⁶

Fiji's reservation to Convention on the Elimination of all forms of Racial Discrimination (CERD) presents a common example of a subordination reservation and illustrates disregard for adherence to the Vienna Convention principles:

To the extent, if any, that any law relating to elections in Fiji may not fulfil the obligations referred to in Article 5 (c), that any law relating to land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in Article 5 (d) (v), or that the school system of Fiji may not fulfil the obligations referred to in Articles 2, 3, or 5 (e) (v), the Government of Fiji reserves the right not to implement the aforementioned provisions of the Convention.

Under the umbrella of this reservation, Fiji may still discriminate based on race in the areas of elections, alienation of land and in the school system. In this example, Fiji does not contemplate a future change in the law and appears unwilling to entertain progressive development in these areas though it clearly recognises the opportunity to do so as reflected in another reservation it made to CERD.

⁷⁵ Lijnzaad, *Reservations to UN-Human Rights Treaties*, 78.

⁷⁶ Imbert, "Reservations and Human Rights Conventions", 28.

In theory, this problem should be dealt with by enacting the appropriate laws on the domestic level in order to provide at least the minimum protections set forth in the relevant treaty. When this objective is not achieved, however, it is more a wait-and-see approach that must be taken. Issues of compatibility are not always initially obvious and this is true in all legal systems. Reservations subordinating obligations to domestic law create a ‘smoke screen’ between the treaty bodies and actual implementation on the domestic level.⁷⁷

Some subordination reservations will be in place only as long as it takes the state to enact the appropriate domestic measures to bring the law into conformity with international obligations, sometimes referred to as a ‘transitional’⁷⁸ reservation. Barbados’ reservation to the ICCPR exemplifies this particular situation:

The Government of Barbados states that it reserves the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3 (d) of Article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present.

By its reservation Barbados intimates that at some point in the future it will pursue full implementation of Article 14.⁷⁹ Redgwell notes that:

A temporary derogation from the full rights and obligations of the State under the treaty pending the realignment of national law does not fall foul of the basic

⁷⁷ Lijnzaad, *Reservations to UN-Human Rights Treaties*, 88.

⁷⁸ Elena A. Baylis, “General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties”, 17 *Berkeley Journal of International Law* (1999) pp. 277, 311.

⁷⁹ It must be noted, however, that Barbados acceded to the ICCPR in 1973 but has yet to withdraw this reservation.

international law prohibitions, embodied in Article 27 of the Vienna Convention, against invoking the provisions of internal law as justification for the failure to perform international obligations...⁸⁰

Legislation on the domestic level is traditionally outside the scope of international law though pursuant to the obligations set forth by human rights treaties there is a positive obligation on State Parties to develop new laws or repeal existing laws in order to bring domestic law into conformity with the international agreement. This positive obligation is increasingly monitored as the number of regulatory treaties grows.⁸¹ Subordinating international obligations to domestic law creates a ping-pong effect where the right is volleyed perpetually between the level of an international obligation and potential recognition on the domestic level.

Federal states typically make reservations subordinating treaty obligations to domestic law in light of the restricted federal-state system.⁸² As indicated by the United States in one of its reservations to the ICCPR, the federal government only obligates itself to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the treaty. Covenant obligations are otherwise left to the state and local governments to implement. The difficulty with this type of subordination is that the bound party is the US federal government, not the federated states.⁸³

⁸⁰ Redgwell, "Reservations and General Comment No. 24(52)", 400.

⁸¹ On the increase in international regulatory treaties directly impacting domestic law see Jacob Katz Cogan, "The Regulatory Turn in International Law", 52 *Harvard International Law Journal* (2011) pp. 321.

⁸² The problematic situation with distribution of powers between the federal government and state governments in the context of international obligations has been the subject of prior international disputes as noted in *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, pp. 466.

⁸³ For an overview of the US position see Bradley and Goldsmith, "Treaties, Human Rights, and Conditional Consent"; Stephanie Grant, "The United States and the International Human Rights Treaty System: For Export Only", in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000) pp. 317-29; David P. Stewart, "U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understanding and Declarations", 14 *Human Rights Law Journal* (1993) pp. 77; for a discussion

As one of the most latterly convened treaties, the CRPD picked up on the federal state reservations to previous conventions and explicitly included in Article 4(5) that all provisions ‘extend to all parts of federal states without any limitations or exceptions’. This purports to take a strong stance against those states relying on the excuse that certain obligations are not supervised on the federal level; however, the reality seems to be that there is little that can be done to alter the practical implications of the federal system in light of these types of reservations as the issue is really one that must be dealt with on the domestic level.

1.3.5 Numerous Reservations to a Single Treaty

It is not merely sweeping or incompatible reservations based on general references to domestic laws that are a concern. State Parties who record a high number of reservations to specific rights due to incompatibility with identifiable domestic laws or local customs demonstrates an unwillingness to entertain progressive human rights. Because human rights treaties contain multifarious obligations, in applying the object and purpose test it is often difficult to tell exactly which obligation will tip the scale in the event that a reservation is made against it. Even more difficult is assessing at what point a large number of otherwise marginal reservations will, by the sum of their parts, violate the object and purpose of the treaty.

The Republic of Niger demonstrates the multiple reservations practice by making such a large number of obligation specific reservations to CEDAW that it creates a serious threat to the realisation of Convention rights and prompts the question, why join? CEDAW Article 28 prohibits reservations incompatible with the object and purpose of the Convention; yet more

of the US approach to reservations to a non-human rights treaty, see, Gregory F. Jacob, “Without Reservation”, 5 *Chicago Journal of International Law* (2004-05) pp. 287.

reservations have been made to it than any other human rights convention. The object and purpose test assesses individual reservations. The Vienna Convention does not address the case of multiple reservations defeating the object and purpose of a treaty as a result of their collective effect. Niger reserved against eighteen CEDAW commitments pointing to its ‘regard to the modification of social and cultural patterns of conduct of men and women’. The state indicated that the articles reserved against were contrary to the existing customs and practices within the country which could be modified only with the passage of time and the evolution of society and, therefore, could not be abolished by an act of authority. Article 5 of CEDAW specifically identifies the purpose of the treaty is:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

With the purpose of CEDAW being the elimination of all forms of discrimination against women, reserving against a large number of the commitments does nothing to support Niger’s status as a State Party as it appears to exist only in name. Niger’s avoidance of CEDAW aims was challenged through objections by both France and the Netherlands.⁸⁴ The objections have thus far had no effect on the government of Niger as it appears that its only commitment is the perpetual non-attainment of gender equality.

In 1987 and 1992, CEDAW Committee General Recommendations addressed the acute problem with reservations to the Convention in light of the perceived invalidity and

⁸⁴ UN Treaty Collection, CEDAW, End Note, Objections to Reservations made by Niger to CEDAW by France, 14 Nov. 2000, and Netherlands, 6 Dec. 2000.

detrimental legal effect of a large number of the existing reservations.⁸⁵ Urging states to evaluate the reservations of other States Parties and reconsider their own reservations, the Committee suggested a move toward a common procedure on reservations commensurate with other human rights treaties.⁸⁶ Unfortunately, the other core human rights treaties appear to be in the same situation.

A better approach is that taken by Chile in its declaration made upon signing CEDAW in 1980 where it contended that at the current time many provisions of CEDAW were not compatible with Chilean legislation but that it had established a law reform committee to assist in rectifying the incompatible terms. Chile did not ratify the Convention until 1989 but when it did it made no reservations indicating persisting incompatibility issues.

1.4 ILC Guide to Practice on Reservations to Treaties

Prior to the 2011 Guide to Practice, the ILC considered reservations to treaties on four occasions including in 1951 in association with the *Genocide Advisory Opinion* and within the framework of developing the 1969 Vienna Convention, 1978 Vienna Convention on Succession of States in Respect of Treaties⁸⁷ and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations⁸⁸. Beginning in 1993, under the leadership of Special Rapporteur Alain Pellet,⁸⁹ the ILC launched an in-depth analysis of the existing reservations system under the Vienna Convention and how the opportunity to make reservations fit into the overall

⁸⁵ CEDAW Committee, *General Recommendation No. 2, Reservations to the Convention*, UN Doc. A/42/38 (1987) and *General Recommendation No. 20, Reservations to the Convention*, UN Doc. A/47/38 (1992).

⁸⁶ UN Doc. A/47/38 (1992), para. 2.

⁸⁷ 1946 UNTS 3, 23 Aug. 1978.

⁸⁸ UN Doc. A/CONF.129/15, 21 Mar. 1986 (not yet in force).

⁸⁹ Pellet was appointed to undertake the task in 1994, see ILC Yearbook 1994, vol. II (Part Two), UN Doc. A/49/10 (1994), p. 179, para. 381.

effectiveness of international treaties.⁹⁰ Particularly the ILC indicated that it would attempt to clarify the special position of human rights treaties within the regulatory framework of the Vienna Convention's reservations system.⁹¹

From the outset of the study the major problem was noted as the reconciliation of two imperatives: 'the need to maintain the essential elements of the treaty on the one hand, and the need to facilitate as far as possible accession to multilateral treaties of general interest,'⁹² thus the integrity versus universality conflict shaped much of the early debate. The project was not envisioned as a complete redraft of the Vienna Convention but was driven by the necessity to fill the existing lacunae in contemporary treaty law as well as to give guidance on related issues, such as interpretative declarations.⁹³ The ILC indicated early in its work that they would not call into question the 1969, 1978 or 1986 Vienna Conventions,⁹⁴ but would try and fill the obvious gaps and ambiguities by providing a 'Guide to Practice' with guidelines and model clauses that could be used in tandem with the existing rules on treaty law in the development of future treaties.⁹⁵

In 2007, despite having formulated a large number of the draft guidelines Pellet sought, for the second time, the input of states on the question of reservations. Particularly he questioned what conclusions states drew in the event that a reservation was deemed invalid due to contravention of Article 19 of the Vienna Convention and whether states favoured the

⁹⁰ ILC Yearbook 1993, vol. II (Part Two) UN Doc. A/48/10 (1993), para. 440.

⁹¹ Alain Pellet, *First report on the law and practice relating to reservations to treaties*, UN Doc. A/CN.4/470 (1995), paras. 138-42.

⁹² ILC, UN Doc. A/50/10 (1995), para. 413.

⁹³ *Note by the Special Rapporteur on draft guideline 3.1.5*, UN Doc. A/CN.4/572 (2006), para. 4.

⁹⁴ See, e.g., ILC, UN Doc. A/50/10 (1995), paras. 428, 430; ILC Yearbook 1997, UN Doc. A/52/10 (1997), para. 157; ILC, UN Doc. A/53/10 (1998), para. 482; ILC, UN Doc. A/64/10 (2009), para. 53.

⁹⁵ ILC, UN Doc. A/53/10 (1998), para. 482.

severability doctrine, the opposability doctrine or a combination of the two.⁹⁶ It further asked states to provide the legal or practical considerations for the response to the initial set of questions. The third question posed to the states was framed as follows: *Do the replies to the above two sets of questions vary (or should they vary) according to the type of treaty concerned (bilateral or normative, human rights, environmental protection, codification, etc.)?* This question attempted to elicit some information on the plausibility of separate specialised reservations regimes; however, the responses were less than illuminating.⁹⁷ The combined lethargy of state responses to the ILC effort to clarify reservations practice supports the assertion made above that states prefer imprecision when it comes to reservations. The remainder of this article outlines the ILC guidance on the problems prevailing when applying the Vienna Convention reservations rules to human rights treaties, as introduced above in *Section 1.2*.

1.4.1 The Object and Purpose Test Remains

Despite the fact that years of debate has not shed any further light on the application of the Vienna Convention rules, the ILC maintains that the object and purpose test should remain.⁹⁸ Pellet went as far as to try and distil a ‘method’ for employing the test pursuant to ICJ interpretations of the test through the years in an attempt to provide guidance on determining the object and purpose of a treaty. Noting that this ‘method’ is at best disparate in its

⁹⁶ UN Doc. A/62/10 (2007), para. 23(a), the questionnaire did not use the terms severability or opposability but instead outlined the consequences of both.

⁹⁷ As of July 2010, only thirty-three states had responded to the questionnaire and those responding were mainly European or Western states. UN Doc. A/65/10 (2010), p. 10, fn. 13. The questionnaire was directed both to states and international organisations serving as depositaries for multilateral treaties, however, because the focus of research deals specifically with reservations to UN human rights treaties, which are open only to states, the discussion is limited to responses by states though the percentage of responses was much higher from the organisations.

⁹⁸ See, e.g., the confirmation of the Vienna Convention regime throughout the development of the study on Reservations to Treaties: *Report of the International Law Commission on the work of its 45th Session*. Yearbook of the ILC 1993, vol. II (Part Two), UN Doc. A/48/10 (1993), para. 440; *Report of the ILC on the work of its 50th session*, ILC Yearbook 1998, vol. II (Part Two), UN Doc. A/53/10 (1998), para. 482; *Report of the ILC on the work of its 61st session*, ILC Yearbook 2009, vol. II (Part Two), UN Doc. A/64/10 (2009), para 53.

application by the Court, he also points out that it is largely based on empirical data from the treaty in question and includes such obvious considerations as the title, the preamble, the introductory articles, articles that demonstrate the major concerns of the Contracting Parties, the preparatory work and the overall framework of the treaty,⁹⁹ as reflected in the Guide to Practice.¹⁰⁰ While it is undoubtedly correct that the object and purpose ‘can be determined only by reference to the text and particular nature of a treaty’ and that there is ‘some degree of subjectivity’ in each case that must be limited,¹⁰¹ the Guide to Practice provides no more than a recapitulation of what has gone before.

The situation is decidedly more bleak when the object and purpose test is applied to human rights treaties. A study commissioned by the human rights treaty bodies supplements the ILC guidance on determining the object and purpose. Hampson designates three considerations as important when determining compatibility of a reservation to a human rights treaty using the object and purpose test: (1) the relationship between separate articles and the whole treaty, (2) the alleged *jus cogens* character of some of the norms, and (3) the distinction between derogable and non-derogable rights.¹⁰² These additions to Pellet’s method track the consistent statements of the treaty bodies in their evaluations of reservations. Hampson¹⁰³ and the treaty bodies¹⁰⁴ ultimately deferred to Pellet in anticipation of him developing a way to apply the object and purpose test to a human rights treaty. Unfortunately, this special test did not materialise.

⁹⁹ Pellet, *Tenth report on Reservations*, para. 81.

¹⁰⁰ Guide to Practice, 3.1.5.1 and commentary.

¹⁰¹ *Note by the Special Rapporteur on draft guideline 3.1.5*, UN Doc. A/CN.4/572 (2006), para. 5.

¹⁰² Hampson, 2004 *Final Working paper*, para. 49. These considerations are reflected in the Guide to Practice under paras. 3.1.5.6 (relationship of separate articles) and 3.1.5.4 (derogability). The commentary to 3.2.5.3, para. 14, indicates that the ILC did not feel it necessary to draft a guideline specifically on reservations to *jus cogens* norms.

¹⁰³ Hampson, 2004 *Final working paper*, para. 72.

¹⁰⁴ Chairpersons of the Human Rights Treaty Bodies, *Report on their nineteenth meeting: Report of the sixth inter-committee meeting of human rights treaty bodies*, UN Doc. A/62/224 (2007), para. 16(6).

Despite the ILC's inability to produce a definition for the object and purpose test, for a moment there was a nod of consideration extended to human rights treaties in the preparation of the Guide to Practice:

3.1.12 Reservations to general human rights treaties (draft guideline)

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.¹⁰⁵

As noted by the original commentary on this guideline, Pellet uses the three elements most often deemed indicative of a human rights treaty—indivisibility, interdependence and interrelatedness—in an attempt to strike a delicate balance between the right that is the subject of the reservation and the effect that a reservation to the provision produces, including the impact of the reservation.¹⁰⁶ In a nutshell, states should consider the fact that a human rights treaty is a human rights treaty. This draft guideline specifically addressing reservations to human rights treaties was replaced by final guideline 3.1.5.6 which expunged direct reference to human rights treaties opting, instead, for more general terms and urging consideration of the specifics of the treaty under review. Bearing in mind the vast number of reminders about the indivisibility, interdependence and interrelatedness of human rights as well as the importance of the rights addressed and the negative effect that certain reservations might produce, the guidelines are not particularly instructive even if well-intended.

¹⁰⁵ Original text adopted at the 59th session of the ILC, ILC Yearbook, UN Doc. A/62/10 (2007), p. 65.

¹⁰⁶ Original text adopted at the 59th session of the ILC, ILC Yearbook, UN Doc. A/62/10 (2007), p. 113, *Commentary on Draft Guideline 3.1.12 on Reservations to Treaties*.

1.4.2 Defining the Legal Effect of an Invalid Reservation

The uncertainty about how to apply the object and purpose bleeds into the next critical difficulty in the application of the Vienna Convention reservations rules to human rights treaties. The lack of determinable legal effect of an invalid reservation represents another gap in the reservations rules as there is no clear guide about how to categorise the legal effect of an invalid or impermissible reservation. If a reservation is invalid for structural or procedural deficiencies, the issue can be dispensed with more easily as it cannot be ‘established’ and therefore cannot have legal effect pursuant to Vienna Convention Article 21. Impermissible reservations—those failing the object and purpose test—however, present a more difficult problem due to the imprecise nature of the test as noted above. Though the primary concern of this section is reservations that are impermissible specifically due to incompatibility with Article 19(c), the problem of determinable legal effect in the context of reservations to human rights treaties is also prevalent for sweeping reservations and reservations that subordinate international obligations to domestic law, both of which have been acknowledged to be contrary to Article 19(c) (impermissible) as well as structurally deficient (invalid) due to the indeterminable scope and breadth.

Article 21 of the Vienna Convention specifically addresses the legal effect of a *valid* reservation and its modification of treaty relations between the reserving state and another State Party based on its acceptance or objection thereto.¹⁰⁷ The article is premised on the fact that the reservation is valid as the ability of states to object to valid reservations is the political feature of the flexible reservations regime. There is no firm position on the legal effect of an *invalid* reservation in the Vienna Convention. The *travaux préparatoires* of the

¹⁰⁷ Ineta Ziemele and Lāsma Liede, “Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6”, 24 *EJIL* (2013) pp. 1135, 1142. N.B. this article does not address the separate issue of the effect of an acceptance or objection of a reservation on the reserving state’s consent to be bound to the treaty.

Vienna Convention do not make clear whether a reservation which has ‘fallen at the hurdle of Article 19(c) because of incompatibility with the object and purpose of the Convention is nonetheless open to acceptance or rejection by States under Article 20(4).’¹⁰⁸ According to the ILC, a reservation can only have a legal effect if it is established, which means that the reservation is valid (and permissible) and has been accepted¹⁰⁹ otherwise it is a nullity.¹¹⁰ In other words, the legal effect is established between the reserving and accepting state to the extent the treaty obligations are modified or excluded (released from compliance)¹¹¹ *inter se* to the extent of the reservation.¹¹² Alternatively, between the reserving and objecting state the treaty obligations which are subject to the reservation will not be applicable between the two or the convention will be applicable in its entirety between the two—the ‘super-maximum effect’¹¹³—if the objecting state has so indicated. Thus, a reservation’s legal effect, or lack of legal effect, under the Vienna Convention rules is based on the reaction, whether an acceptance or objection, by another State Party. For the purposes of examining legal effect in this section there is an assumption that a state has taken a view that a formulated reservation is invalid.

Under the Vienna Convention regime, if multiple states object to a reservation on the basis of invalidity or impermissibility, the fall-out for the reserving state will be tangible as it would be unlikely that the reserving state would be able to maintain the invalid reservation due to the reciprocal nature of rights and responsibilities reflected in most treaties. The same cannot be said of normative human rights treaties; the international obligations contained therein

¹⁰⁸ Redgwell, “The Law on Reservations in Respect of Multilateral Conventions”, 8; see also Redgwell, “Universality or Integrity?”, 259 et seq.

¹⁰⁹ Reflecting the principle set out in Vienna Convention 21(1)(a). See also, Guide to Practice, 4.1.

¹¹⁰ Guide to Practice, 4.5.1: ‘[a] reservation that does not meet the conditions of formal validity and permissibility...is null and void, and therefore devoid of legal effect.’ See also, Swaine, “Reserving”, 315; Bowett, “Reservations to Non-Restricted Multilateral Treaties”, 75 et seq.

¹¹¹ N.B. this article does not examine the difference in effects created by modifying and excluding reservations.

¹¹² Guide to Practice, 4.2.4.

¹¹³ Guide to Practice, 2.6.1, commentary paras. 24, 25.

create a state-human being relationship and human beings do not get a look-in at the treaty formation process. The state-human being relationship¹¹⁴ suffers detriment because individuals are unable to invoke the legal effect flowing normally from the traditional concept of reciprocity. Thus a determination of invalidity under the Vienna Convention system deprives the beneficiary of a human rights treaty from any benefit or redress such as that enjoyed among State Parties.¹¹⁵ This is an unintended effect of investing human beings with rights under international law. The reserving state is the only party to enjoy the benefit of the reservation as the legal effect is only applicable to itself. The state-human being relationship is at the mercy of the state-to-state relationship that the Vienna Convention falsely assumes to be important in a human rights treaty.

The potential legal effect of a sweeping reservation poses an immeasurable threat to human rights treaties. There is little to remedy the effect of sweeping reservations which could deprive the treaty of its object and purpose primarily because it is difficult to ascertain the extent to which obligations are modified by these reservations. There are a number of such reservations to which no objections have been made thus, in theory, the reserving state has modified all aspects of the treaty which fall under the reservation and these effects could be enjoyed reciprocally by an accepting state. This potential situation results from the establishment of the reservation through tacit acceptance, or silence, on the part of other State Parties.¹¹⁶ As noted by Boerefijn, ‘the ILC’s primary concern about vague and general reservations is that these cause problems for other contracting states in assessing the extent to

¹¹⁴ e.g., in the Guide to Practice, 4.2.5, commentary para. 4, recognising the existence of the ‘state-person’ relationship in human rights treaties.

¹¹⁵ Ziemele and Liede, “Reservations to Human Rights Treaties”, 1142.

¹¹⁶ Vienna Convention, Art. 20(5).

which the reserving state is bound' but it avoids addressing the consequences for the human beings affected by a reservation.¹¹⁷

Reservations that subordinate international obligations to domestic laws also create a problem as to the determinable effect of the reservation on the obligation. Vienna Convention Article 27 prohibits states from using internal law as a justification for failing to perform a treaty. Most authors employ Article 27 specifically in response to states attempting to use overly-broad references to internal law as a cover for not actually accepting new obligations.¹¹⁸ The ILC points out that it should 'be borne in mind that national laws are "merely facts" from the standpoint of international law and that the very aim of a treaty can be to lead States to modify them.'¹¹⁹ Once again, applying the object and purpose test is difficult for State Parties if they are unfamiliar, which will most likely be the case, with the domestic laws of the reserving state. Therefore, the Vienna Convention's in-built state policing system is underutilised and a great number of these reservations remain attached to the core human rights treaties.

The ILC suggests that reciprocity of legal effects may serve as a deterrent role because a reserving state 'runs the risk of the reservation being invoked against it' and thus this helps resolve the tension between flexibility and integrity.¹²⁰ This suggestion is moot, however, in the context of a human rights treaty as never has state attempted to invoke reciprocity of legal effect in relation to a reservation under this category of treaty. The Guide to Practice attempts to address the legal effects of treaties embodying non-reciprocal obligations:

¹¹⁷ Boerefijn, "Impact on the Law on Treaty Reservations", p. 95.

¹¹⁸ Hampson, *2004 Final working paper*, para. 56.

¹¹⁹ Guide to Practice, 3.1.5.5, commentary para. 5.

¹²⁰ Guide to Practice, 4.2.4, commentary para. 31.

4.2.5 Non-reciprocal application of obligations to which a reservation relates

Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

This attempt, however, only underscores that fact that treaties embodying non-reciprocal obligations are different while doing nothing to remedy the lack of concrete effect. As noted in the commentary, the nature of human rights obligations do not engage the concept of reciprocity among the State Parties and therefore the only logical conclusion even in the absence of the guideline is that an accepting (most likely in the form of tacit acceptance) State Party would not seek to limit its obligations to the extent that the reserving state has done.¹²¹ Logic, however, does not clarify the legal effect of sweeping reservations or reservations that subordinate obligations to domestic law as there is no guidance on how to assess their validity outwith the normal state-to-state application of the Vienna Convention rules.

To rectify questions about tacit acceptance, which is the primary way that invalid reservations have become ‘valid’, the Guide points out that an individual state’s acceptance of an impermissible reservation is a nullity.¹²² Hampson also concludes that states may not formulate reservations that are incompatible with the object and purpose of a human rights

¹²¹ Guide to Practice, 4.2.5, commentary para. 4.

¹²² Guide to Practice, 3.3.3.

treaty nor could incompatible reservations be accepted.¹²³ This is in line with the view advanced by the ILC throughout the Guide to Practice. The ILC insistence that acceptance, even of an invalid reservation, is a nullity is, however, practically inoperable as it fails to recognise the contemporary practice that the state initially determines permissibility under Article 19(c) unless an alternative rule requires otherwise. Even noting the ‘impossibility’¹²⁴ of accepting an impermissible reservation there is nothing outlined to counter the fact that by virtue of tacit acceptance, just this situation has arisen despite the ILC claim that acceptance cannot change impermissibility.¹²⁵ Furthermore, this position lacks a basis in customary international law as noted by Germany in its response to the draft guidelines on reservations.¹²⁶

The hard and fast nullity proposition posited by both the ILC and Hampson is actually contradicted after its laborious introduction in the Guide to Practice. The Guide suggests that the question is unsettled as to whether collective acceptance could render an impermissible reservation permissible.¹²⁷ If all of the parties to the treaty envision an amendment to the treaty which would mitigate the intervening impermissibility, the option already exists under Vienna Convention Article 39¹²⁸ and need not be addressed as part of the reservations regime. Over the years, the lack of settled approach has led some to call for an advisory

¹²³ Françoise Hampson, *Specific Human Rights Issues, Reservations to Human Rights Treaties, Expanded working paper prepared in accordance to Sub-Commission decision 2001/17*, UN Doc. E/CN.4/Sub.2/2003/WP.2 (2003), p. 19.

¹²⁴ Guide to Practice, 3.3.3, commentary para. 4.

¹²⁵ Guide to Practice, 3.3.3.

¹²⁶ See comments by Germany, ILC, *Reservations to treaties, Comments and observations received from Governments*, UN Doc. A/CN.4/639 (2011), paras. 127-28.

¹²⁷ Guide to Practice, 3.3.3, commentary para. 8.

¹²⁸ Art. 39: General rule regarding the amendment of treaties provides: “A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.”

opinion by the ICJ on the issue of the ability of states to accept impermissible reservations, though to date this idea has not come to fruition.¹²⁹

State practice has developed two primary approaches addressing the legal effect of reservations, the principles of permissibility and opposability. In early reports on reservations Pellet suggested that regardless of whether the permissibility or opposability doctrine was applied, the reserving state could not invoke an impermissible reservation to produce a legal effect: in the first instance, because the permissibility principle was based on the fact that an impermissible reservation is null and void regardless of the view of other states while under the opposability doctrine the reserving state could not invoke an impermissible reservation even if it had been accepted.¹³⁰ Either way, both doctrines proceed from the idea that a reservation that violates the object and purpose test is null and void regardless of state response and can, therefore, have no legal effect. In theory, the only difference between the doctrines occurs when the reservation is valid and therefore the state-to-state relationships will be modified in different ways.

The prevailing opinion of the ILC and treaty bodies¹³¹ suggests that no invalid reservation can create a legal effect that would modify or exclude otherwise binding obligations.¹³² Regardless of the reaction, or inaction, of a state to an impermissible reservation, the Guide commentary reiterates that the view taken by a state on the reservation—holding the reservation impermissible or permissible—will not prevent the reservation from being

¹²⁹ Redgwell, “Reservations and General Comment No. 24(52)”, 410, citing R. Jacobson, “The Committee on the Elimination of Discrimination Against Women”, in P. Alston (ed.), *The United Nations and Human Rights* (1992), p. 469; Schabas, “Time for Innovation and Reform”, 78.

¹³⁰ ILC Yearbook 1995, UN Doc. A/50/10 (1995), para. 418.

¹³¹ Chairpersons of the HRTBs, *2007 Report on Reservations*, para. 16(7).

¹³² Guide to Practice, 4.5.2.

subjected to other normal mechanisms of review.¹³³ The problem with this idea is that a cyclical argument is advanced by the Guide. An impermissible reservation is a nullity without regard to state acceptance or objection but determination of impermissibility is a competence shared equally by states, dispute resolution mechanisms and treaty bodies.¹³⁴ The opportunity for different bodies to assess permissibility seems to negate the idea that impermissibility exists without regard to state opinion or, at the very least, it minimises the role of states. Redgwell has commented that it precisely the lack of ‘a treaty mechanism for determining compatibility...or a supervisory organ competent to determine validity’ which perpetuates ‘the general inertia of States manifesting itself in tacit acceptance ensur[ing] that reserving States become parties to treaties even in circumstances where they have formulated incompatible reservations’.¹³⁵ As noted above, not all states accept the ILC’s assertion that an invalid reservation is a nullity that cannot be accepted as this has never been a confirmed rule under customary law¹³⁶ and the state practice of maintaining invalid reservations clearly counters the idea of reservation nullity and embraces the principle that ‘a state cannot be bound without its consent’.¹³⁷

Whilst the ILC’s attempt to fill one of the major practical gaps in the Vienna is an ideal legal outcome for those opposed to invalid reservations to human rights treaties, neither the Vienna Convention, customary international law, the ILC Guide to Practice nor the work of the treaty bodies provide a clear answer. If the nullity of invalid reservations is such an obvious legal certainty then there should not be so many invalid reservations attached to the core human rights treaties. In the Guide to Practice, the issue of states’ objections to invalid reservations

¹³³ Guide to Practice, 3.3.3, commentary para. 11.

¹³⁴ Guide to Practice, 3.2.

¹³⁵ Redgwell, “Reservations and General Comment No. 24(52)”, 405-06.

¹³⁶ See comments by Germany in contrast to comments by Finland in ILC, UN Doc. A/CN.4/639 (2011), paras. 127-28 and 129.

¹³⁷ *Genocide Opinion*, p. 21.

is ultimately wheedled down to serving the singular purpose of initiating a reservations dialogue and calling the invalidity to the attention of potential assessors of validity, including courts and treaty bodies. Thus it appears that the final word on legal effect of invalid reservations under the rules set forth in the Vienna Convention is that there is no final word.

1.4.3 The Defined Consequence of an Invalid Reservation

Reservation practice has reinforced that the legal effect between State Parties and the legal effect on the state-human being relationship created by human rights treaties are not one and the same. From a strict treaty law perspective the concern is not the state-human being relationship. However, if the ultimate point of a human rights treaty is to fortify this relationship, more consideration should be paid at the treaty law level. The present analysis is concerned with the actual legal effect, or more accurately the *consequence*, produced as a result of a determination of invalidity by other State Parties. Initially part four of the Guide to Practice points out that reservations ‘are defined in relation to the legal effect that their authors intend them to have on the treaty’¹³⁸ despite the fact that the statement may not produce the intended legal effect.

Guideline 4.5 introduces the topic of consequences of an invalid reservation. It is this particular aspect of the reservations rules that is ripe for the progressive development of law especially in light of the adverse effect on human rights treaties. The ILC acknowledges that the lack of consequences is ‘one of the most serious lacunae in the matter of reservations in the Vienna Conventions’.¹³⁹ Though legal nullity is the desired consequence, particularly in a human rights treaty, the lack of finality on who decides permissibility destabilises the actual consequence intended by declaring a reservation a legal nullity. The ILC contends that nullity

¹³⁸ Guide to Practice, 4, commentary para. 2.

¹³⁹ Guide to Practice, 4.5, commentary para. 16.

based on the impermissibility of a reservation is objective and not dependent on the reactions of other state parties,¹⁴⁰ yet this only addresses the state-to-state relationship. Furthermore, it fails to recognise that the acceptance and objection interplay is the entire basis of the reservation monitoring system created by the Vienna Convention and precisely the reason why so many invalid reservations remain attached to the core human rights treaties today. States claim the right to determine validity yet in the case of the normative human rights treaties the status of reservations has proved to be unclear even when one or multiple states have objected to reservations on the basis of invalidity.¹⁴¹ The reserving state benefits from the presumption of validity and there is no legal imperative to withdraw a reservation deemed invalid by another state as it is highly unlikely that an objecting state will press the issue.

The ILC's cautious approach to impermissible reservations during the early years of its study favoured the objecting state and placed the onus upon the reserving state to take action to redress the inappropriate reservation such as modifying or withdrawing the reservation or relinquishing membership in the treaty altogether.¹⁴² The necessity of placing the burden on states to bring about a consequence, such as withdrawing the reservation, is because the Vienna Convention system lacks a control and annulment mechanism. Without an identifiable and tangible consequence the effect of the invalid reservation still hangs in the balance. As the Vienna Convention is silent on the issue of consequences, the potential to develop the subject should be viewed as an opportunity. More detailed rules on what happens to a reservation that has been declared invalid would go a long way toward rectifying the

¹⁴⁰ Guide to Practice, 4.5.1, commentary para. 10.

¹⁴¹ This stems largely from the fact that the reservations rules also represent a political feature to be optimised by states.

¹⁴² Text of the Preliminary Conclusions of the ILC on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, *Report of the ILC on the Work of its 49th Session*, UN Doc. A/52/10 (1997), Ch. V, para. 86. See discussions by Roberto Baratta, "Should Invalid Reservations to Human Rights Treaties Be Disregarded?", 11 *EJIL* (2000) pp. 413, 418-19; Redgwell, "Reservations and General Comment No. 24(52)", 408.

ambiguity surrounding invalid reservations to the core human rights treaties. Presently, there exist two options establishing the legal consequence of an invalid reservation. The first is nullity which, as discussed above, results in the invalid reservation being void *ab initio*. Nullity by definition is both the legal effect and the consequence of an invalid reservation. Reiterating the argument above, the problem with nullity in the current context of the Vienna Convention regime is that the nullity is only invoked among states in their treaty relations *inter se*. Nullity equates to a reserving state ‘shooting blanks’, reservations which will never have a consequence for another State Party to the treaty. Because invalid reservations to human rights treaties affect the state-human being relationship and human beings cannot invoke nullity, severability provides a more concrete consequence in response to a reservation that is determined to be invalid.

1.4.3.1 Severability

There is no recognition of severing reservations in the Vienna Convention. The concept has been developed primarily through court and treaty body jurisprudence and has gained increasing recognition among states. Severability proposes that when an invalid or incompatible reservation is made then the author state will be bound to the treaty ‘without the benefit’¹⁴³ of the reservation. Redgwell highlights that:

Severance is conceptually closer to the regime envisaged by the Genocide [Opinion], where the International Court of Justice, in departing from the unanimity rule, was at pains to ensure that complete freedom to make

¹⁴³ The preferred ILC terminology for severance. For a more complete analysis of the severability principle see Kasey L. McCall-Smith, “Severing Reservations”, 63:3 *International and Comparative Law Quarterly* (forthcoming July 2014).

reservations did not include the ability to formulate reservations striking at the core of the treaty; hence the compatibility test.¹⁴⁴

The *Genocide Opinion* concluded that even in the event that a reservation had been objected to by a State Party to the Genocide Convention the reserving state would still become a party to the Convention unless the reservation was not compatible with its object and purpose. The Court offered little guidance other than to suggest that an incompatible reservation would be severable. The advantage to this approach is that the state will remain bound to the treaty.¹⁴⁵

In a bid to fill the consequences gap and with the support of the treaty bodies,¹⁴⁶ the ILC put forth their most progressive guideline detailing the status of a state that has formulated an invalid reservation. Departing from previous views on regional human rights approaches to invalid reservations,¹⁴⁷ the Guide to Practice indicates that the reservation will be severed.

4.5.3 Status of the author of an invalid reservation in relation to the treaty

1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.
2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation.

¹⁴⁴ Redgwell, "Reservations and General Comment No. 24(52)", 410.

¹⁴⁵ Ibid., 407.

¹⁴⁶ Chairpersons of the HRTBs, *2007 Report on Reservations*, para. 16(7).

¹⁴⁷ ILC, UN Doc. A/52/10 (1997), para. 84. In the report Pellet suggested that the Strasbourg approach was a form of regional customary law that did not otherwise impact customary law on reservations.

3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation.

4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.

This guideline applies a rebuttable presumption that the author state formulating an invalid reservation will remain bound by the treaty without the benefit of the reservation unless the state expresses an alternative intention.

Thus the guideline adheres to the principle of severability, without using the specific term except in the commentary, but allows room for movement in the instance that the author state's consent to be bound is tied to the acceptance of its reservation. This position pays deference to the regional human rights courts, the treaty bodies and reflects the growing recognition of the principle by states and observers.¹⁴⁸ The Guide to Practice also advocates the doctrine of 'divisibility' or 'severability' if a reservation is formulated which clearly contravenes Article 19(a) or (b).

While this step to cure the consequences gap perpetuated by the Vienna Convention is undoubtedly one in the right direction, there is still a question as to whether the proposal will pass muster in the larger international community of states. Early indicators suggest that a

¹⁴⁸ Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent"; Redgwell, "Reservations and General Comment No. 24(52)", 411.

‘severance rule’ will not sit easily with all states.¹⁴⁹ The lack of a consistent practice by states as to how invalid reservations should be handled has consistently impeded resolution of the issue despite the clear growth in the recognition of the severability principle. Outwith the ILC and the treaty bodies the one point that is undisputed about the consequence of an invalid reservation is that there is no settled practice or common agreement on how to resolve the issue particularly in the context of state-to-state treaty relations.

1.4.4 Determining Reservation Validity

As argued elsewhere, establishing a final view on reservation validity would be the logical first step toward determining the legal effect and consequence of an invalid reservation.¹⁵⁰ Clearly this could prove difficult in light of the competing organs which are competent to assess reservations. Despite the ambiguity of the object and purpose test, states have proved that they can apply the test to determine the validity of a reservation. However, due to the lack of guidance on legal effect and the consequence of an invalid reservation, reserving states have largely ignored other State Parties’ determinations of invalidity. The ILC asserts nullity and severance as the legal effect and consequence of an invalid reservation, however, in practice there remains resistance to these concepts especially in the state-to-state relationships created in the course of accepting and objecting to reservations. States that have formulated invalid reservations continue to maintain the validity of their reservations because there is no definitive rule enunciating at what point the validity of a reservation can no longer be in doubt. Unfortunately, even objections purporting to sever the incompatible reservations rarely bear effect on the reserving states as it is unlikely that an objecting state would pursue

¹⁴⁹ Comments by Germany and the United States in ILC, UN Doc. A/CN.4/639 (2011), paras. 149-50 and 170-82 and compare with, Comments by El Salvador and Finland, in paras. 135-36 and 138-45; UN Treaty Collection, CRPD, Sweden’s objection to El Salvador’s reservation to CRPD; *Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations*, UN Doc. A/50/40 (1995).

¹⁵⁰ McCall-Smith, “Reservations and the Determinative Function”.

a reserving state in an international arena, such as the ICJ, merely to have confirmation that the reservation is invalid and, therefore, severable.

While the increased acknowledgement of severability is an advantage to the human rights system as a whole, its actual impact is rather limited in the state-to-state context as states do not enjoy reciprocal rights and obligations under the core human rights treaties. The rights-holders who are affected are not recognised under the Vienna Convention. This situation illuminates the ineffectiveness of the objection practice for producing a tangible legal effect or consequence in the face of an invalid reservation. As outlined by Swaine,

...the suggestion that states are inadequate [to be the sole arbiter of reservations] calls into question a premise more or less common to the permissibility and opposability approaches—the acceptance of state appraisals, through objections or otherwise, govern the acceptance of reservations—and creates doubt as to whether the Vienna Convention is a complete regulatory system.¹⁵¹

While the Vienna Convention regime may not be complete, the flexibility of the system and the recognition that the tools for interpreting a treaty might expand (Article 31) suggests that progressive practices have the potential to better guide the effects of invalid reservations to human rights treaties. The ambiguities of the Vienna Convention reservations regime could be more appropriately addressed if an arbiter of reservation validity outwith the State Parties were designated to provide final review of questionable reservations. The core UN human rights treaties are uniquely situated to designate a competent reservation review mechanism

¹⁵¹ Swaine, “Reserving”, 322.

in light of the treaty-specific supervisory mechanisms which already play a central role in monitoring treaty implementation by State Parties.¹⁵²

Reservations to human rights conventions should not, in the words of Golsong, be left to ‘the play of objection and acceptance on the part of other Contracting States’.¹⁵³ The beneficiaries of obligations established by the core human rights treaties are deprived of the full benefits of these treaties due to the normative gaps in the Vienna Convention regime. Recognising the treaty bodies as competent arbiters of reservation validity would be a step-forward in providing coherence in the normative order that oversees international human rights.

The Guide to Practice affirmed the long-standing treaty body assertion that in addition to Contracting States, treaty bodies could serve in a determinative capacity in evaluating reservation permissibility.¹⁵⁴ The Guide, however, took special care to not give precedence to one assessment organ over another:

3.2 Assessment of the permissibility of reservation

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- Contracting States or contracting organizations
- Dispute settlement bodies
- Treaty monitoring bodies

¹⁵² McCall-Smith, “Reservations and the Determinative Function”, pp. 537 et seq.

¹⁵³ Herbert Golsong, “Les reserves aux instruments internationaux pour la protection des droits de l’homme”, cited in Imbert, “Reservations and Human Rights Conventions”, 35.

¹⁵⁴ ILC, *Reservations to Treaties*, UN Doc. A/CN.4/L.744 (2009), p. 3-4, draft guideline 3.2.

Thus these organs share a determinative capacity and may not determine validity to the exclusion of one another, which makes sense considering the varying relationships each will have with a reserving state. Unfortunately, the ILC attempt to provide guidance on the issue of legal effect flowing from a reservation assessment by a treaty body serves only to reinforce the current limits of any legal effect rather than to clarify:

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.
2. The assessment made by such a body in the exercise of this competence shall have no greater legal effect than that of the act which contains it.

For treaties of general applicability composed of reciprocal obligations the even playing field envisioned by this guideline is suitable because the legal effect is more easily ascertained. However, in the context of human rights treaties, the absence of hierarchy coupled with the lack of concrete consequence for invalid reservations results in a futile confirmation of that which has been widely accepted without addressing the more important question of how the different assessment organs should work together.

Treaty bodies are clearly at liberty to assess reservations as part of the periodic reporting procedure. This is supported by Vienna Convention Article 31 as well as the evolving practice of the treaty bodies as recognised by states. Though this is an essential and effective role, in most cases it is clear from the reports issued by each of the bodies that compliance

with the reporting procedures are far from perfect and their observations on the reports often fall on deaf ears. The disparity among the treaty bodies in their approaches to reservations over the past thirty years highlights the ambiguity of the Vienna Convention rules. The lack of options regarding legal effect available to the treaty bodies as constituent organs as opposed to State Parties does not, without further clarification, leave them many options as permissibility and opposability are not available choices.

The existence of the treaty bodies is more readily comparable to the supervisory organs of the European Convention on Human Rights and the American Convention on Human Rights. Thus the roles of the treaty bodies must be strengthened and this can only be done effectively by refinement and state recognition of their competencies. '[T]he integrity of human rights treaties calls for the recognition of the role that international supervisory machinery can play in monitoring reservations filed by states, as a step toward more effective implementation of human rights norms.'¹⁵⁵ In her examination of the CEDAW Committee's crusade on reservations, Schöpp-Schilling notes that no actor was specified to decide on the compatibility of reservations and though 'the Committee's efforts...had proven successful in bringing the issue onto the agenda and into the final documents of the World Conference on Human Rights, the issue...remain[s] unresolved.'¹⁵⁶ The tools exist to rectify decisions on reservation compatibility, but there are important steps that must be taken in order for the entirety of states to recognise the value of the system already in place.

1.5 Conclusion

¹⁵⁵ Shelton, "State Practice on Reservations to Human Rights Treaties", 234.

¹⁵⁶ Hanna Beate Schöpp-Schilling, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: An Unresolved Issue or (No) New Developments", in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004), pp. 3-40, 17-18.

Several gaps in the application of the reservations rules to human rights treaties remain despite the concerted efforts of ILC over the course of its almost two decade study on reservations. Admittedly, they are difficult gaps to fill, yet it seems clear that international law, and treaty law in particular, possesses the flexibility to foster change. Logical steps can be taken to close the gaps and the Guide to Practice set this change in motion. While it is difficult to tell how much influence the Guide to Practice will have on states, particularly in light of their lack of interest in providing information on state reservations practice, there must be a starting point. The UN General Assembly noted the major importance of the topic of reservations and the Guide to Practice in December 2013.¹⁵⁷ Though this is an important step in support for the outcome of such a prodigious project, Pellet notes that the Guide to Practice ‘...will live its own life; practice only will be judge of its adaptation to the needs of the international community’.¹⁵⁸

If the object and purpose test remains as the ultimate test of reservations permissibility, the end product of a decision using the test must be objectively identifiable. Ultimately, the competing ideas regarding legal effect and consequence signify uneasiness with the rules as they exist and a lack of settled practice on the international level. The ILC, the treaty bodies and many states favour severability. While this is a welcomed result for human rights advocates, it remains to be seen whether a majority of states will fall in line with this point of view. One thing is clear; unless a definitive view is taken on the invalidity of a reservation, it seems that there can be no resolution of the issue of legal effect or consequence.

In over sixty years, little progress has been made toward clarifying reservations to human rights treaties despite more than one considerable effort. Many question why there is any

¹⁵⁷ UN General Assembly, Resolution 68/111 – Reservations to treaties, UN Doc. A/RES/68/111 (2013)

¹⁵⁸ Pellet, “A General Presentation by the Special Rapporteur”, 1094 (footnotes omitted).

need for clarification and the most obvious answer is that the number of regulatory treaties is steadily increasing and not just in the realm of human rights. If international law is intended to expand—and in light of the multitude of multilateral treaties on the horizon expansion appears to be the intention—then at the very least the rules must be clear so that the codification of international law is not a futile effort. Whilst the opportunity to resolve reservations dilemmas for many of the core human rights treaties has passed, it is incumbent on international lawyers to provide a solution for the question of reservations for the treaties of the future that will govern how we as a human race, and our governments as our international guardians, operate in this shared space.